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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1423

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal, Second Appellate District, State of California

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ALAN R. VOGELER
2500 Central Trust Center
201 E. Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800
Attorney for Appellant, The Western and Southern Life Insurance Company

Of Counsel:

BARBARA G. WATTS
FROST & JACOBS
2500 Central Trust Center
201 E. Fifth Street
Cincinnati, Ohio 45202

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INTRODUCTION

Appellant, The Western and Southern Life Insurance Company, hereby submits its brief in opposition to Appellee's Motion to Dismiss or Affirm (hereinafter Motion).

ARGUMENT

Contrary to Appellee's contention, (Motion, p. 5), this Court did not consider the validity of comparative retaliatory taxes in *Prudential Insurance Company* v. *Hobbs,* 328 U.S. 822 (1946). *Hobbs* involved three Kansas taxes imposed on the foreign insurer: a firemen's relief fund tax, a premiums tax, and the retaliatory tax in G.S. 1935, 40-253, correctly quoted on page 6 of Appellee's Motion.

However, the sole contention made in the Kansas Supreme Court in respect to each was that the commerce clause was violated and that *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944), rendered prior decisions "obsolete." *In re Insurance Tax Cases,* 161 P.2d 726, 731 (1945). The Kansas Supreme Court carefully pointed out that the Kansas taxes had been a part of Kansas law *since 1871, Id.* at 730, and significantly declared:

> When each of the plaintiffs *was admitted to do business* in this state it either specifically or in legal effect agreed to be bound by the laws of the state respecting its business.

Id. at 733 (emphasis supplied). The Court meticulously footnoted the date of admission of each of the sixteen insurers involved and which of them were affected by the retaliatory tax. *Id.* at 728. Not a single one so affected was admitted in Kansas *until long after the crucial 1871 date.*

The Kansas Supreme Court provided its own syllabus of its decision, as follows:

1. Our statutes pertaining to insurance, G.S. 1935, 40-252, subd. B, 40-253, 40-170, and G.S. 1943 Supp. 40-1702 and 40-1703 were not rendered void by the decision of the Supreme Court of the United States in United States v. Southeastern Underwriters Ass'n, 322 U.S. 534, 64 S. Ct. 1162, 88 L.Ed. 1440.
2. Congress did not exceed its powers in passing Public Law No. 15 of the 79th Congress, first session, 15 U.S.C.A. § 1011 et seq.
3. Mandamus will not be allowed to compel an executive officer to do something contrary to a statute unless it is clear that the statute is void.

The memorandum opinion of this Court could do no more than affirm the foregoing propositions of law. In affirming, this Court relied upon its decision of a week earlier in *Prudential* v. *Benjamin,* 328 U.S. 408 (1946), which had been written with the *Hobbs* case in mind. Significantly, in *Benjamin* this Court had cautioned:

> We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein.

Id. at 431, n. 40. This expressly excluded approval of the retaliatory tax feature in *Hobbs,* for it was not a feature of the South Carolina tax. The retaliatory tax was necessarily removed from consideration in *Hobbs* because it had been *imposed as a condition for the admission* of the insurers in Kansas.

The case involved proceedings in mandamus originally instituted by sixteen insurance companies (later joined by six others) to compel the Commissioner of Insurance to issue them certificates of authority to do business in Kansas in 1945 without payment on their part of the premium taxes on their 1944 business or of fireman's relief fund taxes. They based their action on the claim that *South-Eastern Underwriters* rendered void all state regulation and taxation of insurance companies engaged in interstate commerce. The Kansas Supreme Court denied the writs, finding that the *South-Eastern Underwriters* decision did not pass upon the validity of any state law regulating or taxing insurance companies. Nor did the Supreme Court of Kansas find that there was any discrimination against foreign as compared to domestic insurance companies. The Court said:

> It is true that domestic insurance companies are taxed on a different basis. They are not required

> to pay a tax measured by their premiums but they are required to pay a capital stock tax . . . and a tax upon the net value of their assets . . . . The fact that the tax on domestic companies is upon a different basis than that upon foreign companies does not of itself render the tax invalid . . . . We are unable to find in the record evidence to support the view that the tax in question upon foreign insurance companies is greater than that levied on the home insurance companies. More than that, the counter abstract of the defendant clearly demonstrates that the foreign insurance companies have not been handicapped in transacting their state business in Kansas by reason of any differences in the methods of taxation.

In re Insurance Tax Cases, 161 P. 2d at 734.

The language of the Kansas Supreme Court is far different from that of the Los Angeles County Superior Court in the instant case, which found such discrimination and handicap to exist, and indeed found that Western and Southern Life Insurance Company has been required to pay $977,853.57 more in taxes to California than it would have had it been a California company.

Appellee correctly states that in the case of *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946), this Court concluded that Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause *"to whatever extent this may be done."* The question remains, what is the extent of Congess' power. Can Congress grant power to the states to legislate discriminatorily? Does Congress have the power itself to classify for tax purposes purely on the basis of residence? If Congress can not itself under the constitution discriminate between taxpayers engaged in interstate commerce based on unreasonable classifications, can it nevertheless grant states the power to do so? Appel-

lant submits that the answer to each of these questions is "No."

The Board states in its Motion that 49 of the 50 states currently have insurance retaliatory taxes and that

> "*all* of those taxes are of the purely 'comparative' type such as the Kansas statute involved in *Hobbs* and the California provisions involved in the case at issue". Motion, page 11 n. 9.

These statements are clearly erroneous. No such taxes upon foreign insurance companies exist in New Mexico, North Carolina and Hawaii. Further the Board's statement that *all* taxes are "purely comparative" is also erroneous. For example, the Florida retaliatory provision, Fla. Stat. Ann § 624.429 (3) (b) (1969) provides that a foreign insurer which maintains a regional home office in the state "shall not be subject to retaliation as it relates to premium tax." North Carolina eschews retaliatory laws all together, as follows:

> "No fees or taxes imposed in this article shall be increased on account of any retaliatory law [in § 58-152, Gen. Stats. 1943] now in effect in this or any other state, but such fees and taxes shall apply to all insurance companies alike, as specified in this article, without regard to state, territory or country of domicile or location of home office, and without regard to any fees or taxes which may be levied by any jurisdiction in which any company may be domiciled or have its home office."

N.C. General Stat. § 105-228.8.

If the practice of retaliatory taxation of insurance companies is widespread, this only magnifies the substantiality of the issues involved herein. The fact that so many states have adopted a discriminatory measure does not change the Constitution of the United States.

The alleged purpose of the retaliatory tax statutes is to:

> "aid in the protection of insurers formed under the laws of [this state] and transacting insurance in other states . . . against discriminatory or onerous requirements under the laws of such states . . . ."

See, e.g., Code of Ala. 1975 § 27-3-29 (1) (1977); Ky. Rev. Stat. Ann. § 304.3-270 (1) (1970).

The Appellee at p. 10 of its Motion repeats a statement by the California Court of Appeal in *Atlantic Insurance* v. *State Board of Equalization,* 255 Cal. App. 2d 1 (1967), that the purposes of retaliatory insurance tax laws are to "secure reciprocity" and "to achieve uniformity of treatment and not to discriminate." The assumption upon which this statement rests is that insurance companies in states with higher tax rates are somehow responsible for those rates. This is patently absurd, both as to the notion of control of the legislature by insurance companies and the hypothesis that any insurance company wants higher tax rates, whether in the domiciliary or another state.

Retaliatory taxation of insurance companies has been recognized as perpetuating an unsatisfactory form of gross receipts tax. Pyle, The Metamorphic Retaliatory Tax Law (What Lies Ahead?), XXII Association of Life Insurance Counsel Proceedings, (1971-72), p. 857. The National Association of Insurance Commissioners at its Annual Convention adopted on December 17, 1970, the following policy statement:

> In summary, the task force finds the present system of premium taxation to be unfair and inappropriate to the contemporary insurance economy, and recommends, as a single and indivisible program, the elimination of premium tax discrimination between domestic and foreign companies, the elimination of pre-

mium tax discrimination among types of insurance organization or arrangement, the elimination of retaliatory premium taxes.

Retaliatory taxation cannot accomplish its alleged purposes. The result is neither uniformity within a state, nor uniformity between states. It would be entirely possible under the existing California law for 49 insurance companies, each from one of the other 49 states, having the same assets, liabilities and mix of business, to be assessed 49 different tax amounts to do business in California, dependent solely on the laws of their respective domiciles. The Constitution of the United States does not permit such a result. Classification solely on the basis of domicile is invalid. *Western Union Telegraph Company* v. *Frear,* 216 F. 199 (W.D. Wis. 1914). The entire scheme of retaliatory taxation is misconceived, discriminatory, and doomed to its present unfortunate state unless this Court acts.

This Court after 76 years reversed *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1868) and determined in *U.S.* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1946) that insurance business was interstate commerce. If *Prudential* v. *Benjamin* and *Prudential* v. *Hobbs* are authority for the proposition that the discriminatory taxes levied by California and other states on foreign insurance companies are constitutional, it is time to reverse those decisions. If those cases are not authority for such proposition, Appellant urges this Court to take this opportunity to say so.

CONCLUSION

Appellant repeats its belief that the constitutional questions involved in this case are so substantial as to warrant plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

ALAN R. VOGELER

2500 Central Trust Center
201 E. Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

Attorney for Appellant, The Western and Southern Life Insurance Company

Of Counsel:

BARBARA G. WATTS
FROST & JACOBS

2500 Central Trust Center
201 E. Fifth Street
Cincinnati, Ohio 45202

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